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IN THE

Supreme Court of the United States

October Term, 1969
No. 297

PURER & COMPANY and PHILLIP PURER,
Petitioners,

vs.

AKTIEBOLAGET ADDO and ADDO MACHINE COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents Aktiebolaget Addo and Addo Machine Company, Inc. in Opposition.

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Statement of Case.

The petition for a writ of certiorari of petitioners Purer & Company and Phillip Purer (hereinafter collectively "Purer") claims that the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit have so far departed from the accepted and usual course of judicial proceedings as to call for review by the Supreme Court. The petition claims seven such departures. They are:

Four instances (Points I, II, III and VI in the Petition) in which documents were admitted in evidence over objections. In each instance there existed ample

statutory and decisional authority for their admission. Moreover, there was ample, undisputedly admissible evidence to support the judgments of the District Court and the Court of Appeals.

. A refusal of the Court of Appeal to make an independent determination of the meaning or effect of certain documentary evidence (Point IV). The petition ignores the fact that the trial court heard oral testimony regarding the meaning or effect of such documentary evidence.

. An alleged misstatement of the law of unfair competition by the District Court and the Court of Appeals (Point V). Again, there is overwhelming authority in support of the holding of both courts on the law of unfair competition.

. An alleged failure of the District Court to specificallly find patent infringement. The petition ignores, or petitioners have forgotten, the admission in their pretrial statement that Purer "admits he has been using plaintiff's patented item in his adding machine . . ." At pretrial infringement was conceded; the issue at trial was whether it was justified by a license.

Facts.

Before further considering these alleged departures from the accepted and usual course of judicial proceedings, a brief review of the facts of this lawsuit is in order because the facts have been stated most misleadingly in the petition.

In November, 1964, Purer wrote Aktiebolaget Addo (hereinafter "Addo"), a Swedish manufacturer of adding machines, stating "our company has just completed

the engineering and prototype of an adding machine" and that "there exists some similarity in our design and your patent numbers 2,985,363 and 2,854,190." [Ex. 20.] Purer requested a license to use such patents.

After further correspondence [Exs. 22 and 25] in which Purer made additional statements referring to "our proposed adding machine," which would go into limited production "starting in May of this year [1965]," Addo granted Purer the requested license. Purer immediately began offering to sell a copy of the Addo adding machine that had been manufactured in Japan. The adding machine sold by Purer did not merely bear some similarity to Addo's design; it was an exact copy, so exact that the parts were interchangeable with the Addo adding machine. [Rep. Tr. pp. 375-394.] It was not starting limited production after the patent license was granted; it had been in production in Japan by the Tokyo Electric Company for several years during which Addo had attempted to have its manufacture halted (an attempt Addo thought had been successful at the time it granted the patent license). [Rep. Tr. pp. 36-42.]

Obviously Purer's claim to have "just completed the engineering and prototype" was untrue. Not only did Purer make positive misrepresentations of fact, it concealed one crucial fact that might have alerted Addo to the true situation, which was the fact that Purer & Company's correct corporate name at the time it wrote Addo requesting the license was Tokyo Electric Company International. [Ex. 39.] It was not until after Purer had requested the patent license that its corporate name was changed to Purer & Company.

When Addo discovered it had been fraudulently induced to grant the patent license, it promptly rescinded it. Nevertheless, Purer continued to offer to sell the infringing copy of the adding machine and advertised that it was licensed by Addo to manufacture and sell the entire adding machine, and not merely licensed to use its patented parts. [Ex. 52.]

Addo then commenced this action in the United States District Court for the Central District of California. Jurisdiction was based both on diversity of citizenship, 28 U.S.C.A. § 1332, and patent infringement and unfair competition, 28 U.S.C.A. § 1338.

At trial, without a jury, Addo called five witnesses and introduced approximately seventy exhibits during nearly three days' presentation of its case. Purer called no witnesses and rested at the conclusion of Addo's case. Purer's motion for a new trial and to amend the findings of fact and conclusions of law was denied after hearing, judgment was entered in Addo's favor, was affirmed by the Court of Appeals, and a rehearing was denied by that court.

Because Purer called no witnesses and offered no testimony on its behalf, Purer is necessarily limited to attacking the evidence which supports the District Court's findings of fact and attacking the correctness of the conclusions of law. This attack generally fails to overcome the mandate of Fed. R. Civ. P. 52(a) that such findings shall not be set aside unless clearly erroneous.

REPLY TO PETITIONERS' ARGUMENT.

1. Evidentiary Questions.

Purer's objections to the admission of certain documents in evidence fail to explain in what manner, if any, it was prejudiced by the receipt of such documents. Fed. R. Civ. P. 61 states in part:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

See,

Ginsburg v. Ginsburg, 276 F. 2d 94, 96 (9th Cir. 1960), *cert. den.* 364 U.S. 934, 81 S. Ct. 381 (1961).

Furthermore, since this was a trial to the court, the presumption is that, if any incompetent evidence was admitted, it was disregarded. As stated in *Thompson v. Carley*, 140 F. 2d 656 (8th Cir. 1944):

> "In a nonjury case, the presumption is that the trial court considered only the competent evidence and disregarded all evidence which was incompetent. . . . This Court will not reverse a trial court in a nonjury case for having admitted incompetent evidence, whether objected to or not, unless all of the competent evidence is insufficient to support the judgment appealed from or unless it affirmatively appears from the record that the incompetent evidence complained of was relied upon by the trial court and induced the court to make an essential finding which would not otherwise have been made." 140 F. 2d at 660.

Turning to the specific documents to which objection is made, Purer first objects to certain financial summaries. (Point I.) The 1966 annual report of Addo [Ex. 3] was introduced as were two documents [Exs. 4 and 48] summarizing business records. These documents went to the peripheral issues of the scope of the operations of Addo and the amount that it had invested in engineering, research, advertising and publicity. Such summaries are admissible when the original "consists of numerous . . . writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." *Cal. Ev. C.* § 1509. In addition, testimony on these same matters was given by the presidents of Addo and of its United States distributor, Addo Machine Company, Inc. [Rep. Tr. pp. 14-23, 262-270.]

Points II and III object to correspondence with the Addo's Japanese agent regarding efforts to halt production of the Tokyo Electric Company copy of Addo's adding machine and 1963 photographs of that copy. The petition ignores the testimony of Addo's president as to his efforts to halt production of the copy and ignores the crucial fact that, without objection, the Addo adding machine [Ex. 6] and the Tokyo Electric Company copy [Exs. 67 and 70] were admitted in evidence. The statement at page 16 of the petition that the witness, Addo's president, had not seen the interior of the Tokyo Electric Company copy is erroneous. Both the witness and the court saw the interior of both machines.

Point VI, the admissibility of letters from Addo's dealers, is controlled by *Phillips v. Glazer*, 94 Cal. App. 2d 673, 676, 211 P. 2d 37 (1949). This case has been cited by Addo both in the District Court and the Court of Appeals and has not been distinguished or explained by Purer. As stated by the Court of Appeals, these documents "were not admitted for the truth of the matter stated therein, but for the limited purpose of showing" state of mind. (Pet., Appendix "A", p. 8.)

2. Scope of Appellate Review.

Purer contends (Point IV) that a conflict exists among the Courts of Appeals as to the powers of such courts to review documentary evidence. Such a conflict may exist, but it has no relevance to this case. Purer claims that a photograph at the bottom of its letterhead stationery beneath which appeared the legend "New Modern Facility In Ohito" gave Addo notice of Purer's Japanese connection. The District Court heard the testimony of Addo's president that he did not examine the photograph [Rep. Tr. p. 187] and the court stated, in response to Purer's claim that the legend beneath the photograph gave actual notice:

> "I reject that contention altogether. If that was his intention to convey that [information], he could at least have said 'Japan.' He knew at that time that the very mention of Japan would have put the Addo people on their guard, and there would be no deal." [Rep. Tr. pp. 457-458.]

3. Unfair Competition.

Point V of the petition states that "to constitute unfair competition the producer's product must be identified by the public with that of the manufacturer [sic]." (Pet. p. 21.) Palming off, presumably what is meant by the petition, is the classic example, but certainly not the only basis, of unfair competition. Representing oneself as having the good will of or business affiliation with another, when such is not the case, also constitutes unfair competition. *Stork Restaurant v. Sahati,* 166 F. 2d 348, 355 (9th Cir. 1948), *Hanson v. Triangle Publications,* 163 F. 2d 74, 78 (8th Cir. 1947), *Metro-Goldwyn-Mayer, Inc. v. Lee,* 212 Cal. App. 2d 23, 29, 27 Cal. Rptr. 833 (1963). Purer's advertised connection with Addo, when such connection had been emphatically severed, was false advertising and unfair competition.

4. Infringement.

The petition's concluding point (Point VII) questions the sufficiency of the findings of fact and conclusions of law regarding infringement. It ignores the fact that defendants conceded the validity of the patents in answer to the complaint [Clk. Tr. p. 198], admitted the infringement in the pretrial order [Clk. Tr. p. 536] and the conclusion of the District Court (Appendix "C", p. 17) that Purer's "importation and sale of adding machines incorporating Addo's patented inventions constituted patent infringement. . . ." The petition ends by citing *Autogiro Co. of America v. United States,*

384 F. 2d 391, 396 (Ct. Cl. 1967), for the proposition that the findings should "specifically set forth what portions of defendant's machines infringed upon the inventor's claims." (Pet., p. 24.) There is no holding or dictum to that effect in the cited case.

Conclusion.

In addition to the lack of substance, the petition is filled with errors, including miscitation of statutes, Supreme Court rules and decisions. Jurisdiction of the Supreme Court is based upon 28 U.S.C.A. § 1251 and not upon the statutes cited in the jurisdictional statement of the petition. The question presented arises under Supreme Court Rule 19, not Rule 21. Because there are no substantial substantive issues and because the petition has failed to comply with the rules of the Supreme Court, Addo submits the petition should be denied.

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